No. 88-716

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1988

ROBERT COOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether the "good faith exception" created in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) permits the admissibility of evidence seized in a search not founded on probable cause, based on a "bare-bones" affidavit insufficient to show objective reasonableness on the part of the affiant?

I

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Opinion Below

The opinion of the Tenth Circuit Court of Appeals is set forth in the Appendix, as is its Order denying the Petition for Rehearing on September 16, 1988.

Grounds on Which the Jurisdiction of this Court is Invoked

28 U.S.C. § 1254: CERTIORARI JURISDICTION.

Constitutional Provisions and Statutes

United States Constitution Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

21 U.S.C. § 841 (a) (1):

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance..."

Statement of the Case

Petitioner Robert Cook was charged with violating 21 U.S.C. § 831(a)(1), arising out of cocaine seized from his apartment. The search was conducted by state police officers, under a warrant issued by a novice state judge upon the "bare-bones" affidavit of a fourteen-year veteran of the police force. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

The trial court suppressed the fruits of the search, holding that the affidavit did not establish probable cause. The court also held, after evidentiary hearing, that the prosecution had failed to carry its burden of proof under *Leon* to demonstrate that the officers executing the warrant acted in "good faith." The affidavit and testimony introduced at the hearing appear in the Appendix.

The Tenth Circuit reversed. Although the Court of Appeals acknowledged that the evidence introduced at the suppression hearing was "anemic at best", and the sufficiency of the affidavit was debateable, suppression was nevertheless held inappropriate based on a *de novo* finding that the officers acted in objective good faith.

At stake here are the parameters of the "good faith exception" created in *Leon*. Can the Constitution possibly be satisfied by a "bare-bones" affidavit which fails to establish probable cause, upheld despite the absence of evidence supporting objective reasonableness? The affidavit submitted in this case, and the facts revealed during the suppression hearing, mandated suppression in this case, and warrant a grant of certiorari to set aside the novel approach taken by the Tenth Circuit.

Argument

A RESIDENTIAL SEARCH PREMISED ON A WARRANT SUPPORTED ONLY BY A "BARE-BONES" AFFIDAVIT DOES NOT COMPORT WITH THE FOURTH AMENDMENT, AND FORMS NO BASIS FOR APPLICATION OF THE "GOOD FAITH EXCEPTION" CREATED BY *UNITED STATES V. LEON*

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Here, the Tenth Circuit has upheld a search based on an affidavit which clearly did not establish probable cause, making a finding of "good faith" without factual basis. The affidavit in this case was of the "bare-bones" genre decried in *Leon*. The affidavit was fatally defective under *Illinois v. Gates*, 462 U.S. 213, 106 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

At issue here is whether probable cause existed to conduct a full-scale search of a citizen's residence based on the uncorroborated claims of the "hauntingly familiar" confidential informant. *United States ex rel. Metze v. State*, 303 F. Supp. 1359 (D.N.Y. 1969). In order to pass constitutional muster, a "substantial basis" must be shown for crediting hearsay information in affidavits for search warrants. *Illinois v. Gates, supra. Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

Prior to *Gates*, the seminal decisions governing affidavit sufficiency were *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 4 L. Ed. 2d 723 (1964). These two cases gave rise to a "two-prong" test. In *Illinois v. Gates, supra*, this Court abandoned the "two-prong" test, adopting a "totality of the circumstances" analysis, holding that "rigid legal rules are ill-suited for probable cause review."

Thus, to be legally sufficient, the search warrant affidavit must demonstrate "a fair probability that contraband or evidence of a

crime will be found at a particular place." *Illinois v. Gates, supra.* Thus, although the *Aguilar-Spinelli* test is no longer strictly applicable, it is unquestioned that the veracity and reliability of a confidential informant "are all highly relevant." *Illinois v. Gates, supra.*

Here, the confidential informant was "not even alleged to be reliable." *See Maddox v. State,* 133 Ga. App. 709, 213 S.E. 2d. 1 (1975). Further, here, totally unlike *Gates,* there was no significant corroboration of the information allegedly provided by an unnamed "confidential informant."

Corroborating facts to elevate hearsay into probable cause "must be sufficient to raise the reliability to constitutional standards," *United States v. Evans,* 481 F. 2d 990 (9th Cir. 1973), and such corroboration must do more than confirm minor details of the tip such as confirming the identity of the owner of certain premises or the outside appearance thereof. *United States v. Menser,* 360 F. 2d 199 (2d Cir. 1966). Corroboration of "major portions" of a tip are necessary to satisfy the "substantial basis" test. *Illinois v. Gates, supra; Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2nd 327 (1959).

Here, there was no corroboration of "major portions" of the unnamed "confidential informant's" tip: on the contrary, only the fact of residence, already known to the police, was "corroborated." The affidavit was clearly defective under *Gates.*

Despite the patent insufficiency of the affidavit, however, the Court of Appeals reversed suppression, based on its own *de novo* review finding that the "good faith exception" saved the search. What this amounts to is a rewriting of the Constitution. As applied by the Tenth Circuit, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *United States v. Leon, supra* n. 13. The ruling by the Tenth Circuit eviscerates the Fourth Amendment.

The "good faith exception" created in *Leon* is not one of subjective good faith, but rather, is an objective "standard of reasonableness." *United States v. Leon, supra* n. 20. Here, the Government put on no evidence at all concerning the objective reasonableness of the affiant's reliance. On the contrary, there was no evidence introduced that the affiant reasonably relied on this recently-appointed judge's determination of probable cause in any way. The testimony was that the detective went to the judge for a search warrant because he "believed at the time that there were drugs present in the apartment

mentioned." This testimony did not support a finding of good faith under *Leon*.

The need for the exclusionary rule here is obvious. The affidavit itself provides no basis for a finding of "good faith." Here, a search warrant was issued on the basis of an affidavit which clearly could not provide probable cause, resulting in an unconstitutional search. To deny suppression of evidence from this search based on an insupportable ad hoc finding of "good faith" reliance would be to bring to life precisely those concerns which motivated this Court to require objective reasonableness.

Here, since the affidavit itself was devoid of factual support for probable cause, and the government introduced no evidence of objective reasonableness, the trial court's findings should have been affirmed. If this were not so, the police, as opposed to the courts, will be in a position to dispositively determine the legality of their own searches through later glib testimony about noble intentions and subjective perceptions. Thus, the "exception" will subsume the "rule": that search warrants should only issue on probable cause.

Upholding the search in this case will have the effect of eliminating judicial review, as a practial matter, whenever a search warrant is issued. Probable cause thus becomes expendable, so long as the officers seeking the warrant managed to persuade some judicial officer to sign the warrant in the first place. This is not the law, at least not yet.

The petitioner therefore prays that this Honorable Court will issue its writ of certiorari to review the decision of the Tenth Circuit, and to reverse its decision upholding the search of the petitioner's apartment.

Respectfully submitted,

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Robert Cook

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Case Number 88-1124

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROBERT DOUGLAS COOK,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 87-CR-372)

Kathryn Meyer, Assistant United States Attorney (and Michael J. Norton, United States Attorney, with her on the brief), Denver, Colorado, for Plaintiff-Appellant.

Scott H. Robinson, of GERASH, ROBINSON & MIRANDA, P.C., Denver, Colorado for Defendant-Appellee.

Before **McKAY** and **BRORBY,** Circuit Judges, and **PARKER,*** District Judge.

BRORBY, Circuit Judge.

*The Honorable James A. Parker, United States District Judge.

This case comes before the court on an interlocutory appeal pursuant to 18 U.S.C. § 3731 and Fed. R. App. P. 4 (b). The United States District Court for the District of Colorado suppressed a quantity of cocaine, physical evidence of a violation of 21 U.S.C. § 841 (a) (1). The Government appeals.

The Government presents two issues: (1) did the district court err in finding that the affidavit in support of the search warrant failed to establish probable cause; and (2) did the district court err in refusing to apply the "good faith exception" to the exclusionary rule as set forth in *United States v. Leon*, 468 U.S. 897, *reh. denied* 468 U.S. 1250 (1984). Assuming but not holding that the affidavit fails to establish probable cause, we believe the district court erred in refusing to apply the good faith exception to the exclusionary rule as set forth in *Leon*.

The facts of the case are undisputed. On November 27, 1987, a detective with the Denver Police Department applied for and obtained a search warrant to search the defendant's apartment. At the time of the application, he had been a law enforcement officer for fourteen years and had served at least eleven of those years in the Narcotics Bureau of the Denver Police Department. He personally prepared the affidavit in support of the warrant, and delivered it to a deputy district attorney in Denver, who read and approved the documents. The detective then presented the affidavit to a state court judge who issued the warrant commanding the named detective or any other officer authorized to search for and seize evidence as detailed in the warrant. The execution thereof netted bulk cocaine, sealed packaged cocaine, bulk marijuana, narcotic paraphernalia and packaging equipment, a police scanner, and other items. Subsequently the defendant was indicted by a federal grand jury for possession with the intent to distribute in excess of 500 grams of cocaine in violation of 21 U.S.C. § 841 (a) (1). The defendant filed a Motion to Suppress, the district court granted the motion, and the Government now appeals.

Good Faith Exception

In *Leon*, the Supreme Court modified the Fourth Amendment exclusionary rule to provide that evidence seized under a warrant later found to be invalid may be admissible if the executing officers acted in good faith and in reasonable reliance on the warrant. *United States v. Leary*, 846 F. 2d 592, 607 (10th Cir. 1988); *United States v. Medlin*, 798 F. 2d 407, 409 (10th Cir. 1986). The *Leon* Court applied the "good

faith" exception to admit the evidence from a search warrant subsequently invalidated by a lack of probable cause.

In determining whether we should apply the exception, the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon,* 468 U.S. at 922, n.23. To answer this "objectively ascertainable question," we are to consider "all of the circumstances," *id.,* and assume that the executing "officers. . . have a reasonable knowledge of what the law prohibits." *Id.* at 919-20, n.20; *Leary,* 846 F.2d at 607. Furthermore, "The government, not the defendant, bears the burden of proving that its agents' reliance upon the warrant was objectively reasonable." *United States v. Michaelian, 803 F.2d 1042, 1048 (9th Cir. 1986); Leary,* 846 F. 2d at 607, n.26.

The record in this case reveals that at the suppression hearing the Government introduced into evidence the affidavit, search warrant, and return and inventory. At that hearing the detective who drafted and swore to the contents of the affidavit testified: (1) he was a police officer for the City and County of Denver, has been a police officer for approximately fourteen and one-half years, and had been assigned to his current work in the narcotics bureau for approximately eleven and one-half to twelve years; (2) he prepared the affidavit; (3) he took the affidavit to a deputy district attorney in Denver who read and approved it; (4) he then took the documents to a county court judge, who asked him no questions and issued the search warrant; (5) he had never met the judge before and had no idea how long he had been a judge; (6) the detective had prepared at least thirty or forty affidavits for search warrants previously, although the record fails to indicate how many of those affidavits were refused, approved or later upheld by reviewing courts.

The Government's elicitation of facts at the suppression hearing was anemic at best. Even so, combined with the facts stated in the affidavit, we believe that the record demonstrates that a reasonably well-trained law enforcement officer would not have known that the search was illigal (assuming it was) despite the magistrate's authorization, as contemplated in *Leon,* 468 U.S. 897. The detective's reliance on the legality of the warrant was objectively reasonable.

In reaching our conclusion, we first note that the affidavit is not devoid of facts. *See United States v. Cardall,* 773 F. 2d 1128, 1133 (10th Cir. 1985); *Medlin,* 798 F.2d at 409. The sources of facts in the affidavit include a first-time confidential informant (C.I.), two detectives, a

police officer, and Denver Police Department records. According to the affidavit, within twenty-four hours of drafting the affidavit the C.I. told the affiant that within the last three days he was at 9888 E. Vassar Drive, Building J, Apartment No. 208 in the City and County of Denver, he observed a male person known to him as "R.C. Cook" in the possession of several "paper decks" of cocaine and large sums of United States currency. The C.I. told the affiant that he had seen cocaine in Cook's possession at the location on several other occasions, and that Cook told the C.I. he was selling the cocaine. The C.I. also stated to the affiant that he was familiar with the appearance and packaging of cocaine because he had purchased and used cocaine in the past.

The affidavit also indicated that the day before the affiant applied for the warrant, a named police officer, who had been working at the apartment complex, observed a lot of foot traffic in and around Building J, Apartment No. 208. The affiant recites in the affidavit his training and experience (as testified to at the suppression hearing), and states that the described activity is consistent with drug trafficking. On investigation, he learned that a party known as Robert Douglas Cook occupied the apartment. Denver Police Department records revealed that Cook was on probation for possession of a controlled substance. The affiant possessed a copy of the judgment of conviction revealing Cook's six year probation. The officer described the address, location, and identifying characteristics of the building where Cook lived.

The second named detective furnished the affiant with the facts that on the date of application for the warrant the buildings were as the above-named officer described and Cook was still listed next to Apartment No. 208 on the inside of building J. Affiant then recites that a records check of Robert D. Cook revealed that he had been arrested in Denver on at least two occasions for illegal possession of a controlled substance, including arrest in possession of cocaine and a .22 caliber handgun in 1985 and another arrest in 1985 in possession of 26.5 grams of cocaine and a .22 caliber handgun.

Although there is a continuing debate about the sufficiency of the affidavit to establish probable cause, we do not believe that the affidavit is so lacking in facts that a reasonably well trained officer would have known that the search was illegal despite the judicial authorization. *Leon*, 468 U.S. at 922, n.23. *Leary*, 846 F.2d at 607. The officer sought review and approval of the affidavit by a prosecutor before seeking and receiving issuance of the warrant by a judge. The

issuing judge found that the facts established probable cause to issue the search warrant. The record reveals that in suppressing the evidence, the reviewing judge reveals that in suppressing the evidence, the reviewing judge viewed the affidavit deficient for the reasons that the affidavit: contained no definition of a "deck" of cocaine; failed to describe a recognizable quanitity of cocaine; failed to establish the reliability of the confidential informant; failed to demonstrate corroboration of the information from the confidential informant; and contraindicated suspicion by stating the suspect was on probation for a drug offense. Even with time to reflect, judges now cannot agree on the sufficiency of the affidavit to establish probable cause. As in *Medlin*, "[i]n such a case the good faith principles established in *Leon* . . . come into play directly." *Id.*, 789 F.2d at 409.

We hold under *Leon*, that the detective's reliance on the judge's probable cause determination and on the technical sufficiency of the warrant was objectively reasonable. The Court stated in *Leon*, 468 U.S. at 926:

> [The] application for a warrant clearly was supported by much more than a "bare-bones" affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable.

Our conclusion herein follows the rationale of *Leon*.

We also believe the application of the extreme sanction of exclusion is inappropriate in this case. As the Court made clear in *Leon*, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. *Leon*, 468 U.S. at 916. As the Court stated:

> In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination . . . "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id.*, 468 U.S. at 921.

The record establishes that the detective's reliance on the judge's determination of probable cause was objectively reasonable. We **REVERSE.**

Case Number 88-1124

SEPTEMBER 16, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable James A. Parker, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROBERT DOUGLAS COOK,
Defendant-Appellee.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER, Clerk

*of the United States District Court for the District of New Mexico, sitting by designation.

Affidavit

The facts tending to establish the grounds for issuance of a Search Warrant are as follows:

That your affiant, Detective Gary E. Salazar, has been a member of the Denver Police Department for the past fourteen years and has been assigned to the Vice/Drug Control bureau for the past eleven years.

Within the past twenty four hours of today's date (11-27-87) your affiant was contacted by a first time confidential informant (C.I.), who will be referred to in this affidavit in the masculine gender, regardless of actual gender. The C.I. related to your affiant that within the past seventy two hours of today's date, he was at the location of 9888 E. Vassar Dr., Building J, apartment #208, which is located within the City and County of Denver, and observed a male party known to the C.I. as "R.C." Cook. The C.I. further stated to your affiant that when he was at the location of 9888 E. Vassar Dr. he observed "R.C." COOK in possession of several paper decks of cocaine, and large sums of U.S. currency.

The C.I. also stated to your affiant that he has been at the location of 9888 E. Vassar Dr. on several other occasions when COOK has been in possession of several decks of cocaine. The C.I. further stated that COOK has stated to the C.I. that he (COOK) was selling the decks of cocaine. The C.I. has stated to your affiant that he is familiar with the appearance and packaging of cocaine because he has purchased and used cocaine in the past.

On October 26, 1987 your affiant was contacted by Denver Police officer John Johnson, who is currently assigned to District #4, who related to your affiant that he has been working in an off duty capacity at the apartment complex located at 9888 E. Vassar Dr. Officer Johnson stated that he had personally observed a large amount of foot traffic in and around building J, apartment #208.

Further investigation by officer Johnson revealed that the residence was occupied by a party named Robert Douglas COOK (11-21-42). Officer Johnson further related to your affiant that he had checked Denver Police Department records and found that COOK was currently on probation for Unlawful Possession of a Controlled Substance. Officer Johnson provided your affiant with a copy of the JUDGEMENT OF CONVICTION which showed that Robert D. COOK was granted probation for a period of six years. This JUDGMENT was signed by Judge Connie L. Peterson of the Denver District Court.

On November 27, 1987 your affiant again spoke with officer Johnson who related that he was still working in an off duty capacity at the apartment complex at 9888 E. Vassar Dr. and that Robert COOK was still a resident of that complex and still resided in building J, apartment #208. Officer Johnson further related that there is still a large amount of individuals that go to COOK's apartment throughout the day and night. Based on your affiant's experience, this type of activity is consistent with drug trafficking.

Officer Johnson has described the location of 9888 E. Vassar Dr. as a large apartment complex with numerous buildings of dark brown brick that are marked alphabetically. Officer Johnson further stated that building J is marked as such, and that apartment #208 is located on the second floor of that building. At approximately 2:15 p.m. on 11-27-87 Detective Gary Rennert, at the request of your affiant, responded to the location of 9888 E. Vassar Dr. building J, apartment #208 and found it to be as Officer Johnson had described it.

Further, Detective Rennert stated to your affiant that inside building J, a security system, which lists residents of building J, show the name "COOK" listed next to apartment #208.

A check of Denver Police Department records by your affiant show that Robert D. COOK (11-24-42) D.P.D. #149528, has been arrested on at least two occasions for the illegal possession of a controlled substance. On 3-30-85 COOK was arrested at 9995 E. Harvard Ave. where he was found to be in possession of cocaine. COOK was also found to be in possession of a .22 caliber handgun, which he found in his pocket. On 4-10-85 COOK was again arrested in Denver and was found to be in possession of 26.5 grams of cocaine, and a .22 caliber handgun.

Based on the above information, your affiant would respectfully request that a SEARCH WARRANT be issued for the location of 9888 E. Vassar Dr. building J, apartment #208, which is located in the City and County of Denver, and for the person of Robert D. COOK. Your affiant would further request that the SEARCH WARRANT be a "NO KNOCK" Immediate Entry Warrant due to the easily disposible nature of the drugs, and for the safety of the officers assisting in the execution of the SEARCH WARRANT.

Transcript

MS. MEYER: Detective Salazar, please

GARY E. SALAZAR, PLANTIFF'S WITNESS, AFFIRMED

THE COURTROOM DEPUTY: Please state your full name for the record.

THE WITNESS: Gary E. Salazar. Spelling of the last name is S-a-l-a-z-a-r.

DIRECT EXAMINATION

BY MS. MEYER:

Q. Mr. Salazar, how are you employed:

A. I am a police officer for the City and County of Denver, currently assigned to the narcotics bureau, and a detective.

Q. And how long have you been a police officer?

A. I have been a police officer for appoximately 14½ years. I have been assigned to the narcotic bureau approximately 11½ to 12 years.

Q. Detective Salazar, would you please look at what have been marked as Exhibit 1 and Exhibit 2.

A. Okay.

Q. Can you identify Exhibit 1?

A. Yes. Exhibit 1 is an affidavit for search warrant that was prepared by me.

Q. How many pages is that affidavit?

A. It is a total of three pages.

Q. Did you submit that affidavit to a judge?

A. Yes, I did.

Q. And did the judge sign that, issue a search warrant pursuant to your affidavit?

A. Yes, ma'am.

Q. And that search warrant is reflected as Exhibit 2?

A. Yes, ma'am.

Q. Did the judge sign that search warrant in your presence?

A. Yes, he did.

Q. Did the judge have any questions about signing that search warrant or that affidavit?

A. No, he did not.

Q. Detective Salazar, when a judge gives you a search warrant to execute, what do you feel your responsibility is?

MR. ROBINSON: Objection, Your Honor, to his subjective—

THE COURT: Sustained.

Q. (By Ms. Meyer) When that search warrant was executed, Detective Salazar —

THE COURT: It's whether he signed the affidavit that we're talking about, and under *Leon* it's a question of reasonable good faith based on a reasonably prudent officer, isn't it? If you have any testimony that goes towards that, elicit it.

Q. (By Ms. Meyer) Detective Salazar, when you compiled the information for the affidavit did you believe that you had sufficient information upon which to obtain a search warrant?

MR. ROBINSON: Objection, Your Honor. Again that goes to the issue of —

THE COURT: Sustained.

Q. (By Ms. Meyer) Detective Salazar, how many search warrants have you executed in the past?

THE COURT: How many affidavits has he prepared would be more pertinent, wouldn't it?

Q. (By Ms. Meyer) How many affidavits have you prepared in the past for searches?

A. I don't know the exact number, but they would run, you know, to numerous. Exact numbers I wouldn't know. I wouldn't even be able to venture a guess. But it would be in excess of, you know, 30 or 40, I would ...

Q. In your entire career, about 30 or 40?

A. Yeah, at least.

Q. And based upon your experience as a Denver police officer, have you had occasion to believe that once you submitted an affidavit, that it was not sufficient upon which to issue a search warrant?

MR. ROBINSON: Objection, Your Honor.

THE COURT: Sustained.

MS. MEYER: Your Honor, it is our position that —

THE COURT: His subjective beliefs are not relevant to the issue, are they?

MS. MEYER: It sounds to me as though defense has made his subjective belief relevant.

THE COURT: Your questions ask for his objective beliefs.

MS. MEYER: That's correct.

THE COURT: Well, what is the relevance of that?

MS. MEYER: May I have a moment, Your Honor?

THE COURT: You may.

Q. (By Ms. Meyer) Detective Salazar, what was your purpose in submitting this affidavit to Judge Satter?

A. My purpose when I prepared the affidavit and subsequently when I took the affidavit to a deputy district attorney in Denver — it was read and approved by him, and I went to the judge — my purpose was to obtain a search warrant to search the premises of 9888 East Vassar, Building J, Apartment 208.

I believed at the time that there were drugs present in the apartment mentioned.

MR. ROBINSON: Your Honor, I would ask that the response be stricken. I don't think that is—

THE COURT: The motion is denied.

MR. ROBINSON: All right. Thank you, Your Honor.

Q. (By Ms. Meyer) And upon the basis of your submission of that affidavit, was a search warrant issued?

A. Yes, it was.

Q. Where? For the address of —

THE COURT: Well, counsel, we have a copy of the warrant here.

Q. (By Ms. Meyer) And upon receipt of that search warrant what did you do?

A. I responded to the address and executed the search warrant.

Q. On the face of the search warrant does it command you to do so?

A. Yes, it does.

MS. MEYER: Your Honor, we would submit that, based upon *United States v. Leon,* Detective Salazar had —

THE COURT: Well, are you finished with your examination?

MS. MEYER: I am, Your Honor.

THE COURT: Then we'll see if defense counsel has any questions.

Mr. Robinson, do you have any questions?

MR. ROBINSON: I believe I do. Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. ROBINSON:

Q. Detective, you indicated that you have been a police officer for 14½ years?

A. Yes, approximately.

Q. And I think you also stated to the Court that you have had experience in preparing affidavits previously?

A. Yes.

Q. How long had this particular judge been a judge at the time you submitted the affidavit to him?

A. I have no idea. I had never met him before.

Q. Isn't it true that Judge Satter was a recently appointed county court judge?

THE COURT: Well, I will take judicial notice of that.

MR. ROBINSON: Thank you.

THE COURT: The only reason I take notice of that is that he moved to withdraw in several cases in which he represented people in this Court, and that it was within the last six months, I believe.

MR. ROBINSON: Thank you, Your Honor.

Q. (By Mr. Robinson) At that time you had not had any previous experience with this judge, correct?

A. When I walked into his courtroom —

THE COURT: Just answer the question.

A. The answer is no.

Q. (By Mr. Robinson) You prepared the affidavit, you and yourself alone? Boy, is that redundant. Let me restate the question.

Were you the person and the only person that actually prepared the affidavit?

A. Myself and Detective Rennert were present when the affidavit was being prepared.

MR. ROBINSON: Your Honor, thank you. That's all I have.

THE COURT: All right. Any redirect?

MS. MEYER: No, Your Honor.

THE COURT: All right, You may step down. Thank you.

Any other evidence to submit in the government's —

MS. MEYER: No, Your Honor.

FILED
DEC 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-716

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT DOUGLAS COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-716

ROBERT DOUGLAS COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence cocaine and other items seized from an apartment pursuant to a search warrant.

On December 8, 1987, petitioner was indicted by a federal grand jury sitting in the District of Colorado. He was charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner moved to suppress cocaine and other items that were seized from his apartment pursuant to a search warrant issued by a state court judge. In his motion to suppress, petitioner claimed that the supporting affidavit did not contain sufficient facts to justify the issuance of the warrant. On January 20, 1988, after an evidentiary hearing, the district court issued an oral order granting the motion. The court stated without elaboration that the affidavit did not establish probable cause for the issuance of a warrant

and that the executing officers could not have relied on the affidavit in good faith.

The court of appeals reversed (Pet. App. A1-A5). The court concluded that the district court erred in refusing to apply the good faith exception to the exclusionary rule adopted in *United States* v. *Leon*, 468 U.S. 897 (1984). In reaching its decision, the court of appeals assumed but did not hold that the affidavit failed to establish probable cause.

Petitioner contends (Pet. 3-5) that the search warrant was based on a "bare-bones" affidavit that contained insufficient facts to justify a conclusion that the executing officers' reliance on the warrant was objectively reasonable. Whatever the merits of petitioner's contention, it is not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current claim to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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